STATE OF MICHIGAN

COURT OF APPEALS

NELLIE SCHULTZ and JAMES SCHULTZ,

Plaintiffs-Appellants,

v

HENRY FORD HEALTH SYSTEMS, d/b/a RIVERSIDE OSTEOPATHIC HOSPITAL,

Defendant-Appellee.

UNPUBLISHED
May 19, 2005

No. 252643
Wayne Circuit Court
LC No. 03-314226-NO

Before: Neff, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition in favor of defendant in this premises liability action. This case arose when plaintiff[1] allegedly slipped on snow-covered ice while walking across defendant's parking lot from her car to defendant's building. We reverse.

Plaintiffs argue that the trial court erred in granting defendant's motion for summary disposition based on the open and obvious danger doctrine. We agree.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). This Court reviews a trial court's determination regarding a motion for summary disposition de novo. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 396-397; 605 NW2d 685 (1999). A motion under MCR 2.116(C)(10) tests the factual support of the nonmoving party's claim. *Id.* at 397. "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition is appropriate only if there are no genuine

[1] Plaintiff's husband, James Schultz, brought a loss of consortium claim and is a plaintiff to this action. However, because his claim is derivative of plaintiff Nellie Schultz's action, the singular form "Plaintiff" will be used throughout this opinion to refer to Nellie Schultz individually.

issues of material fact, and judgment as a matter of law should be granted to the moving party. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

To make a prima facie showing of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). In negligence actions, whether a defendant owed a plaintiff a duty of care is a threshold question of law for the trial court to decide. *Riddle, supra* at 95.

It is undisputed that plaintiff's status was that of a business invitee. In general, an invitor owes a duty to his invitees to exercise reasonable care to protect them from an unreasonable risk of harm resulting from a dangerous condition on the land, but this duty does not extend to warning or protecting invitees from hazards that are open and obvious. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). "[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992), citing *Williams v Cunningham Drug Store, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988). A danger is open and obvious if "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

Plaintiffs claim they presented sufficient evidence to the trial court to create an issue of fact for trial regarding whether the black ice beneath the snow upon which plaintiff fell was an open and obvious condition. In *Mann v Shusteric Enterprises, Inc*, 470 Mich 320; 683 NW2d 573 (2004), the Supreme Court explained:

> To determine whether a condition is "open and obvious," or whether there are "special aspects" that render even an "open and obvious" condition "unreasonably dangerous," the fact-finder must utilize an objective standard, i.e., a reasonably prudent person standard. That is, in a premises liability action, the fact-finder must consider the "condition of the premises," not the condition of the plaintiff. [*Id.* at 328-329 (citations omitted).]

Of significant import here is this Court's most recent decision discussing the dichotomy between black ice and the open and obvious danger doctrine, *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 105-107; 689 NW2d 737 (2004). The facts in *Kenny* are analogous to the instant case. The plaintiff was injured as she slipped and fell on black ice hidden beneath the snow on the parking lot. *Id*. at 101-103. The defendant moved for summary disposition arguing, *inter alia*, that the condition was open and obvious and not unreasonably dangerous; the trial court granted the defendant's motion. *Id*. at 103-104.

The *Kenny* Court examined our Supreme Court's latest decision discussing the open and obvious doctrine, *Mann, supra*. Specifically, the Court gleaned two legal principles from *Mann* which are significant here. First, "[t]he language from *Mann* emphasized by us makes clear that not all snow and ice accumulation is open and obvious," and "*Mann* does not stand for the

proposition that *all* accumulations of snow and ice are open and obvious." *Kenny, supra* at 106-107. Second, "the open and obvious danger doctrine and principles concerning special aspects are equally applicable to cases involving the accumulation of snow and ice." *Id.* at 107. Thus, according to *Kenny*, snow and ice is not open and obvious as a matter of law in all cases, but rather, it must be determined in each case whether, in light of the surrounding circumstances, reasonable minds could differ regarding the open and obvious nature of the ice. *Id.* at 108-109.

The *Kenny* Court thus applied these principles in concluding that the trial court had erred by granting the defendant summary disposition because "reasonable minds could differ regarding the open and obvious nature of black ice under snow." *Kenny, supra* at 108. Specifically, the Court concluded it could not be determined as a matter of law, when viewing the evidence in the light most favorable to the plaintiff, that "a reasonably prudent person with ordinary intelligence would have been able to perceive and foresee the dangerous condition, i.e., black ice under a coating of snow, upon casual inspection." *Id.* The Court found pertinent that the black ice condition under the snow was not visible and there was no evidence of previous rain or extensive thawing "that might put one on notice of the presence of ice under snow that subsequently fell." *Id.* The Court distinguished *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002), *Joyce, supra,* and *Corey v Davenport College of Business (On Remand),* 251 Mich App 1; 649 NW2d 392 (2002), because in those cases, the hazardous condition was apparent, and the plaintiffs, in fact, were aware of the danger. *Kenny, supra* at 110-111.

Applying these legal principles to the instant case, we conclude that there is a genuine issue of fact for trial regarding whether the condition was open and obvious. Plaintiff testified that she could not see the ice before her fall because it was covered by one to two inches of snow. Like the plaintiff in *Kenny,* and unlike the plaintiffs in *Joyce, Corey, and Perkoviq,* there is no evidence that plaintiff had notice of the presence of ice under the snow. Although plaintiff in this case testified that she knew snow and ice, generally, were slippery and could cause injury, this was insufficient to establish that an average user of ordinary intelligence would have discovered the ice upon casual inspection. Indeed, our conclusion is consistent with *Kenny,* in which this Court wrote:

> A jury made up of Michiganders, not a court as a matter of law, is the appropriate arbiter in determining whether the danger was open and obvious**,** taking fully into consideration the condition of the parking lot as it existed at the time of the fall. It can be argued that the presence of snow should have placed plaintiff on notice to be careful in walking such that the same care would have protected against a fall on ice. However, it can hardly be disputed that the danger of walking on ice is far greater than merely walking on snow alone, and a reasonably prudent person would proceed much more cautiously when observing that ice is being traversed rather than snow. [*Kenny, supra* at 108-109.]

When viewing the evidence in a light most favorable to plaintiffs, the trial court improperly determined that the black ice was open and obvious as a matter of law. This determination is a factual question that should have been reserved for the trier of fact. In light of our decision, we need not address plaintiffs' remaining issue regarding whether the black ice was unreasonably dangerous.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Donald S. Owens
/s/ Karen M. Fort Hood